United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM MORTON, et al.,

Defendant-Appellant,

(On Appeal from Final Judgment in the United States District Court for the Eastern District of New York)

Appellant's Brief

JEFFREY WEINGARD
Attorney for Defendant-Appellant
401 Broadway — Suite 1510
New York, New York 10013
Telephone: (212) 223-6820

Dick Bailey Printers — Tel. (212) 447-535

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM MORTON, et al.,
Defendant-Appellant.

ISSUES PRESENTED

1. Whether the Court deprived appellant of his Sixth Amendment right to confrontation by allowing the jury to receive testimony against Morton consisting of highly damaging declarations of alleged co-conspirators without first determining itself the existence of the conspiracy and Morton's participation in said conspiracy in violation of Rule 104(a) of the Federal Rules of Evidence?

2. Whether the Court committed reversible error by permitting the jury to receive hearsay testimony of prejudicial declarations made by alleged co-conspirators after the appellant Morton had withdrawn from the conspiracy in violation of Rule 104(a), and the confrontation clause of the Sixth Amendment?

3. Whether the indictment charged one narcotics conspiracy although the proof established multiple narcotics conspiracies, thus creating a variance between indictment and proof which substantially prejudiced the appellant?

4. Whether there was prejudicial misjoinder in the indictment?

5. Whether the defendant was tried under the purported authority of an indictment which was fatally defective in thac it unlawfully characterized defendant as "John Doe, also known as 'Bebe'", thus lacking the degree of specificity required by the Fifth Amendment? And whether in that connection the Court unlawfully permitted an amendment of the indictment so as to insert the defendant's name, an act which improperly transformed the indictment into the indictment of the Court rather than that of the Grand Jury?

6. Whether by adopting a mechanical policy of deliberately refusing to consider the possibility of imposing a sentence of probation in narcotics cases, the trial Court improperly failed to exercise discretion in selecting an appropriate sentence?

PRELIMINARY STATEMENT

Appellant, William Morton, appeals from a judgment of the United States District Court for the Eastern District of New York, rendered September 19, 1975, convicting him, after a multi-defendant trial before Chief Judge Jacob Mishler and a jury, of the crimes of unlawful distribution of cocaine in violation of 21 U.S.C. §841(a)(1), and conspiracy in violation of 21 U.S.C. §841(a)(1), and sentencing him to concurrent two year prison terms and a term of special parole of five years on each count, to run concurrently.

Appellant is currently at liberty on bail pending appeal.

STATEMENT OF FACTS

The New York-Washington Arrangement

Sometime during the latter part of the winter of 1973, Harry Haralambus, an admitted narcotics trafficker and sometimes informant for the Drug Enforcement Administration, was contacted by the defendant Richard Fabella. At their meeting, Haralambus was told that he could have access to quantities of cocaine (46-55)*. After Haralambus turned over a small sample of cocaine given to him by Fabella to agents of the Drug Enforcement Administration, he proceeded to contact his second cousin, Peter

*References are to the type-written minutes of trial.

Mikedes, who resided in the Washington, D.C. area, and informed Mikedes that he could purchase quantities of cocaine with a view towards selling the contraband in Washington. During their telephone conversation Mikedes indicated that he had a source for distribution (53-55; 650).

Mikedes telephoned Chris Williams, one of his sources, and arranged to meet with Williams at the latter's apartment. When Mikedes arrived, he met Williams and a woman named Carmen Bonita whom he had known previously as an employee at his family's restaurant (651-652). Williams had arranged for the three of them to meet with the appellant William Morton at his home in nearby Maryland. Following that meeting Mikedes, Carmen Bonita and Morton left the Washington area for New York City while Williams remained behind in the District of Columbia (652).

The First Purchase

Mikedes, Bonita and Morton arrived at Haralambus' apartment shortly before the end of December, 1973. Haralambus introduced Bonita and Morton to another of his cousins and they all then proceeded to discuss the impending cocaine transaction (55-56; 653-654). It was agreed at this point that Haralambus would be the middleman between the Washington buyers and the New York sellers. Haralambus contacted defendant Fabella who introduced him to the defendant Leonard Durso. At the meeting

between Durso, Fabella and Haralambus, Durso indicated he would allow Haralambus to take a quarter pound of cocaine for his cost of $3,300.00. However, it was further agreed that Durso would receive approximately $1,700.00 profit following the sale of the quarter pound (60-62).

Having finalized the arrangements with Durso and Fabella, Haralambus returned to his apartment, discussed the arrangements with Mikedes, Bonita and Morton and they all tested a small sample of cocaine which had been supplied to Haralambus by Durso and Fabella. Satisfied with the quality of the cocaine, Mikedes phoned Chris Williams in Washington and, using an agreed upon code, arranged for Williams to wire up $3,300.00 to Carmen Bonita (62-71; 654-660).

The next day, Haralambus and Mikedes accompanied Bonita to a Western Union office where she picked up the sums wired to New York by Williams. Morton was then picked up and Haralambus took the money, left the others, met with Durso and exchanged the $3,300.00 for four ounces of cocaine (72-73; 656-660). When Haralambus returned to his apartment where the others had been waiting, the cocaine was tested, and arrangements were made for Bonita to fly back to Washington, D.C. with the contraband taped to her body (74-78; 661-663).

The next day, Bonita and Morton left by separate means for Washington (79; 663).

Two days later, Mikedes telephoned Chris Williams and learned that Williams had been pleased by the quality of the cocaine (663-664).

Durso Begins to Apply Pressure

While Mikedes and Haralambus were in New York awaiting Morton's return with the profits to be paid Durso, it became clear that a problem was developing in Washington. Apparently, Bonita had cut the cocaine, thereby reducing its quality and making it difficult to dispose of. By this time Durso was demanding that Haralambus and Mikedes live up to their part of the deal by paying him the $1,700.00 owed. In an effort to raise the money, Mikedes contacted Williams who came to New York and proceeded to make arrangements to have some money wired up to him from Washington (80-83; 664-676).

By this time, appellant Morton had returned to New York and it had become clear that the only way to calm Durso and repay the $1,700.00 was by raising enough money -- about $3,300.00 -- to buy another quarter pound so that it could be sold and the entire proceeds of the sale given to Durso to liquidate their obligations. In order to raise the sums needed, Morton acquired and sold a small amount of pharmaceutical cocaine and then arranged to have his wife fly up to New York with some more money, all of which was then given to Haralambus so that he could obtain another quarter pound of cocaine from Durso (83-96; 675-678).

The Second Transaction

By the second week in March 1974, Haralambus obtained sufficient monies and again contacted Durso. After they agreed to the financial arrangements, Haralambus gave him the money and

then returned to his home. Sometime later, Fabella brought over four ounces of cocaine of poor quality. After it was tested, the cocaine was returned to Fabella who indicated that he would bring it back to Durso (95-96; 683-685).

Several days later Mikedes received a call from Durso. Mikedes met Durso and Fabella at a Queens motel and received a substituted quarter pound of cocaine (686). Mikedes returned to Haralambus' apartment where he met with Haralambus, Morton and several other individuals (687). In order to facilitate the turnover of the cocaine so that Durso could be paid his money, Haralambus, Mikedes and Morton agreed to divide the quarter pound into smaller packages and attempt to sell the cocaine in New York City (99-106; 688). Shortly thereafter, Durso and Fabella confronted Mikedes and Haralambus and Durso accused the two cousins of fabricating about the difficulties in Washington and trying to cheat him. During one of these meetings, Durso struck Mikedes in the face (101-104; 688). When it became clear that the cocaine could not be sold easily, Mikedes took the remaining two ounces and returned to his home in Maryland (688-689).

By this time, appellant Morton left for Washington and, according to the testimony at trial, was neither seen nor heard from again by any of the participants in the scheme alleged in the indictment (107).

The Events Following the Termination of Morton's Involvement

By mid-March 1974, Haralambus was clearly avoiding Durso and Fabella in an effort to prevent them from collecting sums of money owed to them from the prior cocaine transactions. When they next met, Durso indicated to Haralambus that he felt as though he had been "screwed around" and further made clear that he expected to be paid the full amount owed to him (110-112). They agreed that Haralambus could work off his debt by "fronting" cocaine for Durso (113). In late May and early June of 1974, Haralambus went to Washington and sold a quarter pound of cocaine supplied to him by Durso to Chris Williams. Apparently, Mikedes brought the parties together and during the meeting at Williams' apartment, various future transactions were discussed and it was agreed that with Haralambus' access to cocaine and Williams' access to marijuana, a trade profitable to both parties could be worked out (114-115, 124-127; 689-691, 693).

When Haralambus returned to New York, he met with Durso and turned over the proceeds of the sales made to Williams. At that time he was about $500.00 short on the expected profits and was accused by Durso with having held back once again (129). Durso again agreed, however, to supply Haralambus with approximately a half pound of cocaine on the same terms as previously agreed to (130-131).

When Haralambus met with Chris Williams to discuss the distribution of the half pound of cocaine, it was agreed that

Haralambus and Williams would become partners and that Haralambus was going to take care of Peter out of his end of the profits. It was further agreed that a specific price had to be obtained for each ounce of cocaine sold so that Haralambus could pay off Durso (132-133). After receiving about $8,000.00 from Williams, Haralambus returned to New York, met with Durso, and paid him the sum received from Williams(133). Apparently, however, Haralambus was still short on the amounts owed to Durso. In June or July of 1974 arrangements were made between Durso, Haralambus and his new partner, Williams, to transport seventeen ounces of cocaine supplied by Durso, to Washington for distribution by Williams (141-143).

When Haralambus arrived in the District of Columbia accompanied by a friend named Paul Rodinsky, he was met at the airport by Williams and brought to a friend of Williams' home where it was agreed that Williams and this individual would work together to distribute the cocaine (144-145).

While the quality of this cocaine was poor, it was understood that Williams could acquire it in exchange for a deposit consisting of fifty pounds of marijuana (145-146). Haralambus took the marijuana back to New York, sold it, and gave the proceeds -- about $8,000.00 or $9,000.00 -- to Durso (146-147). Since Durso was expecting approximately $17,000.00 -- $1,000.00 per ounce supplied to Haralambus -- arrangements had to be made to acquire the balance of the sums owed (147-148). At that time, Williams sent about $2,000.00 to Haralambus which

he sent over to Durso (148). However, it was clear by then that Haralambus could not pay off Durso and was attempting to avoid further contacts with him (149-150). When Haralambus contacted Williams again demanding more money so that he could pay off Durso, Williams indicated that he was having difficulty in disposing of the cocaine. Haralambus and Rodinsky drove down to Washington, and met with Williams. At the meeting Haralambus indicated that while things had been worked out smoothly with Durso he was starting to get "screwed" again and was feeling the "weight" or blame being placed on him for everything that had happened previously (150-151). Williams agreed to do whatever he could but continued to make excuses for his failure to dispose of the cocaine (151). Now, however, it was obvious that Williams was attempting to avoid paying Haralambus the $5,000.00 he continued to owe to Durso. Haralambus went into hiding and attempted to avoid Durso until after he was able to collect from Williams (154).

Sometime in July of 1974, when he realized that the situation with Durso had deteriorated, Haralambus -- who had been an informant for the Drug Enforcement Administration on other cases -- told one of the agents about the situation which had developed with Durso (155-156).

The Extortion and Assault Upon Haralambus

Acting pursuant to the instructions given to him by

the Drug Enforcement Administration agents, Haralambus attempted to meet with and tape various conversations with Durso and Fabella. Approximately three such tape-recorded conversations took place which were offered at trial (155, 178-183, 186-190, 195-197, 200).

On Friday, September 13, 1974, Haralambus was visiting at a friend's home when Durso and Fabella arrived and assaulted him. He was then taken to a nearby phonebooth and told to call his cousin, Peter Mikedes. When Mikedes got on the phone, he was informed by Durso that if he did not get the money owed to him from Williams, Haralambus would be killed. Haralambus was then taken back to his friend's home and, due to the severity of the injuries, was brought to a nearby hospital where he remained for about ten days undergoing surgery and treatment for his injuries (220-228; 693-695; see also 952-959; 978-995; 1004-1009). As a result of the threats and assault, Mikedes forwarded $500.00 to Kathy Ross, a friend of Haralambus, which was eventually given to Durso (693-695).

POINT ONE

THE ADMISSION OF NUMEROUS HIGHLY PREJUDICIAL HEARSAY DECLARATIONS MANDATE REVERSAL AND A NEW TRIAL.

(A) IN ALLOWING THE JURY TO RECEIVE TESTIMONY AGAINST MORTON CONSISTING OF HIGHLY DAMAGING DECLARATIONS OF ALLEGED CO-CONSPIRATORS WITHOUT FIRST DETERMINING ITSELF THE EXISTENCE OF THE CONSPIRACY AND MORTON'S PARTICIPATION IN IT, THE TRIAL COURT ACTED IN VIOLATION OF RULE 104(a), FEDERAL RULES OF EVIDENCE AND THE HEARSAY EVIDENCE RULE, THEREBY DEPRIVING APPELLANT OF THE RIGHT TO CONFRONTATION GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

According to the indictment upon which the defendants Durso, Fabella and the appellant Morton[1] were brought to trial, the government contended that a conspiracy to distribute quantities of cocaine existed between those individuals as well as Christopher Williams, Harry Haralambus and various other unnamed individuals, for a period from February 1974 through July 1974. In addition to the conspiracy count the appellant Morton was named in two substantive counts charging that he distributed cocaine in February 1974 and on March 14, 1974 along with the defendant Durso. The balance of the indictment (counts 1 through 6), charged the defendants Durso and Fabella with various extortions [18 U.S. C. §894(a)] on the theory that they used extortionate means to collect extensions of credit from Haralambus.

At the trial which commenced on July 14, 1975 -- two weeks after the effective date of the Federal Rules of Evidence -- the

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[1] The defendant Christopher Williams' case was severed from his co-defendants with the consent of the government, see Point Two infra. Haralambus was named as an unindicted co-conspirator.

government's only witnesses linking Morton to the two 4 ounce purchases of cocaine allegedly supplied by Durso, were Haralambus and his cousin Mikedes. From the onset of Haralambus' testimony a barrage of declarations allegedly made by various co-conspirators were received in evidence over appellant's strenuous objections; with the Court merely instructing the jury to consider the hearsay declarations of co-conspirators against the appellant only if the jury finds, at the conclusion of the case, that the conspiracy existed, that Morton was a member of the conspiracy and that the statements were made in furtherance thereof (43-52, 54, 67-68, 73-74 81-82, 89-90). Before there was any indication whatsoever through testimony describing Morton's actions and statements which would have demonstrated that he knowingly and intentionally entered into the conspiracy charged in the indictment, various highly prejudicial hearsay conversations involving co-conspirators -- including at least one completed drug transaction (46, 53-56) -- were placed before the jury without any prior judicial determination as to the competence of such evidence.

Moreover, these initial discussions between Haralambus and defendant Fabella, resulting in Fabella giving Haralambus a sample of cocaine which the latter turned over to the Drug Enforcement Administration, clearly occurred at a point in time prior to the dates alleged in the indictment and while Haralambus was serving, at least for this particular transaction, as an informant for the government (45-46, 53-55).

Despite the fact that appellant's counsel specifically asked the Court to determine, in accordance with Rule 104, Federal Rules of

Evidence, whether a sufficient foundation had been established for the receipt of co-conspirators' hearsay declarations against Morton, the Court persisted in its view that this was a jury question upon which it was not required to pass and, in accordance therewith, denied appellant's timely application (67-68, 89-90).

With the adoption of Rule 104(a) Federal Rules of Evidence, virtually all preliminary questions concerning the competence of evidence are required to be determined by the trial judge before receipt in evidence. More specifically, in light of this rule it is improper for the Court to receive a variety of damaging and prejudicial hearsay declarations made by individuals who may or may not be members of a conspiracy and submit those statements to the jury under instructions similar to that in the case at bar without first having concluded as a matter of law that the conspiracy was in existence and that the defendant, against whom the declarations allegedly made in furtherance of the conspiracy are offered, was,indeed, a member of the conspiracy. This clearly was not done in the instant case [Federal Rules of Evidence, Rule 104, Practice Comment by Paul F. Rothstein, pp. 17-18, (Clark Boardman Company, Ltd. 1975); Carbo v. United States, 314 F.2d 718 (9th Cir., 1963); United States v. Dennis, 183 F.2d 201 (2d Cir., 1950) aff'd, 341 U.S. 494, (1951); Weinstein, Federal Rules of Evidence, 104/39-104/45 (Mathew Bender, 1975)].

In his treatise on the Federal Rules of Evidence, Judge Weinstein, while analyzing the impact of Rule 104(a) upon statements by co-conspirators, makes the following observations:

"It seems preferable to characterize this problem as one of competence and to decide the questions under Rule 104(a). To ask the jurors to consider highly prejudicial statements of co-conspirators only if they first find the existence of the conspiracy and the defendant's participation in it, is to present them with too tricky a task, since it creates the absurdity of asking the jury to decide the issue of guilt before they may consider evidence which is probative of guilt. Giving these preliminary questions to the jury violates the spirit of Rule 104, which calls for preliminary determinations by the judge in all cases involving a high potential for prejudice. (Footnote omitted).

"The better practice would be to require a very high degree of proof before admitting the statement. Only if the court is itself convinced beyond a reasonable doubt (footnote omitted) -- considering hearsay as well as non-hearsay evidence -- of the conspiracy, defendant's membership, and that the statement was made in furtherance thereof, should it admit"....[supra at 104/43-104/44].

Judge Weinstein goes on to comment on the question of whether the trial judge should apply the so-called "second bite of the apple" doctrine, that is, after he decides to admit under Rule 104(a), should he then give the jurors the preliminary question and tell them to disregard the primary evidence if they reach a negative decision. In analyzing this approach, Weinstein notes:

"Learned Hand concluded, and his circuit has followed his rule at the appellate level, that the trial court should not give such an instruction since it would only serve to confuse the jury and would serve no worthwhile purpose [United States v. Dennis, supra]. Similarly, the court in Carbo v. United States, (footnote omitted) illustrated the absurdity of such an instruction by pointing out that the judge would, in effect, be telling the jury not to consider the declarations unless they had already found the defendant guilty. Furthermore, this doctrine leads to judicial laxity in that it gives the trial court a convenient means of dealing with the preliminary questions without getting involved in a deep inquiry into the existence of the conspiracy. The better procedure is for the judge

to make the final decision and then let the jury evaluate the probative force of evidence in its decision on the merits...." [supra at 104/44-104/45].

For all intents and purposes the record plainly shows that the trial judge dealt with the essential preliminary question as a question of fact rather than of law, to be left to the jury, in violation of the court's obligation under Rule 104(a) (see Charge 1469-1478).

(B) ADDITIONALLY, THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY PERMITTING THE JURY TO RECEIVE HEARSAY TESTIMONY OF PREJUDICIAL DECLARATIONS MADE BY ALLEGED CO-CONSPIRATORS AFTER THE APPELLANT MORTON HAD WITHDRAWN FROM THE CONSPIRACY IN VIOLATION OF RULE 104(a), AND THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

Although the cocaine conspiracy count covers the period from February to July 1974, the evidence at trial clearly and conclusively proves that the appellant Morton had withdrawn from the conspiracy no later than mid-March 1974 when the second transaction involving the purchase of a quarter of a pound of cocaine did not proceed as planned (95-96, 99-106, 107; 683-685, 686-689). However, and of considerable significance in this regard, when consideration is given to the fact that the jury below acquitted Morton on count 8 of the indictment which concerned the March 14, 1974 purchase from Durso and the attempted distribution of the poor quality cocaine in N.Y., it is fair to infer that the jury concluded that Morton took no part in the second transaction having withdrawn from participation well before March 14, 1974. Despite the fact that the evidence mandated the exclusion of highly prejudicial statements and

acts made and performed by the remaining participants in the alleged conspiracy, the trial court persisted, over continuing and strenuous objection by appellant's counsel, to receive evidence of a variety of cocaine and marijuana transactions -- one involving some seventeen (17) ounces of cocaine and fifty (50) pounds of marijuana -- between Durso, Haralambus, Williams, Mikedes and a variety of other individuals on the fringe of their deals. Quite apart from the fact that the evidence mandates a finding of multiple conspiracies (see Point Two, infra), the trial Court's refusal to preclude the jury from considering any of this evidence against Morton constitutes dimensional prejudice mandating reversal and a new trial.

In analyzing this portion of the record (110-115, 124-127, 129-133, 141-156; 689-691, 693), it should be recalled that various new arrangements had been agreed upon by Durso and Haralambus on the one hand and Haralambus, Mikedes and Chris Williams on the other, which established a variety of different partnerships. First, Haralambus agreed to "front" cocaine for Durso so that he could work off the sums he owed. In order to accomplish the purpose behind these new arrangements, Haralambus and his cousin Mikedes arrived at a new working arrangement with Chris Williams while at a meeting in Washington. At that point it was agreed that Haralambus and Williams would become partners and that Haralambus would take care of Mikedes out of his end of the profits. Various sales were testified to at trial, a variety of deals were described at great length, and thousands of dollars as well as the above noted fifty (50) pounds of marijuana and

seventeen (17) ounces of cocaine passed between these participants. None of these acts and conversations in any way involved Morton who, by now, was avoiding any contact with the others because he couldn't pay off sums he owed Haralambus on the first quarter pound purchase.

In refusing counsel's application to instruct the jury that none of the aforementioned evidence could be considered against the appellant, the Court expressed its view that such a consideration was most probably a fact question which could not be determined as a matter of law (121-123). Upon being pressed by counsel, the Court eventually stated its view that Morton had not withdrawn from the existing conspiracy, noting, however, its opinion that Rule 104 did not require him to determine such preliminary matters (123-124). Thereafter, the jury was exposed once again to the most damaging and prejudicial testimony concerning acts and declarations wholly unrelated to the guilt or innocence of the appellant Morton. This, despite continuing objections from counsel (125-126, 128-129, 130-131, 132, 133-139, 143-145, 146-147, 152-153; 691-692). Although the Court expressed some reluctance to limit the evidence concerning the assault upon Haralambus and the extortionate means used by Durso and Fabella it finally admonished the jury not to consider any evidence relating to the assault and extortion against the appellant Morton (163-167, 175).

At the conclusion of Haralambus' direct testimony, appellant renewed his pretrial motion for severence and a separate trial (231).

Since every indication contained inthe record reflects the fact that Morton had no participation whatsoever in any of the

events transpiring after mid-March 1974, the receipt of this overwhelming abundance of irrelevant hearsay, insofar as it pertains to Morton's guilt or innocence, unduly prejudiced the jury with respect to appellant mandating reversal and a new trial.

POINT TWO

THOUGH THE INDICTMENT CHARGED ONE NARCOTICS CONSPIRACY, THE PROOF ESTABLISHED MULTIPLE NARCOTICS CONSPIRACIES. THIS VARIANCE BETWEEN INDICTMENT AND PROOF AFFECTED SUBSTANTIAL RIGHTS OF APPELLANT.

Whenever a conviction has "been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed" [United States v. Bertolotti, --F.2d-- (2d Cir., dec'd. Nov. 10, 1975, slip opinion 6409, 6417) citing Berger v. United States, 295 U.S. 78 (1935); Kotteakos v. United States, 328 U.S. 750 (1946); see Note, Federal Treatment of Multiple Conspiracies, 57 Columbia L. Rev. 387, 396 (1957)]. In analyzing the multiple conspiracy argument raised, the Bertolotti Court took note of the fact that the Second Circuit had gone to substantial lengths in finding single conspiracies in narcotics cases. Judge Van Graafeiland, writing for the Court, went on to note that " [t]he common thread running through these cases is our treatment of them as general, albeit illegal, business ventures. United States v. Mallah (503 F.2d 971 (2d. Cir., 974)), supra, at 976." [supra at 6418].

As in so many cases in this circuit it seems plain that the government "has merely merged several conspiracies for the sake of convenience" [United States v. Bertolotti, supra at 6419 and the cases cited therein]. Careful analysis of the evidence at bar demonstrates beyond question that the operations centering around Haralambus and Durso "could hardly be attributed to any real organi-

zation, even a 'loose-knit' one" [id. citing United States v. Miley, 513 F.2d 1191, 1206-1207 (2d Cir. 1975)]. Just as in Bertolotti and Miley, "[t]here was no evidence to show that these two 'were conducting what could seriously be called a regular business on a steady basis.' " [id.]. The scope of the operation was defined only by Durso's tenacity in seeing to it that Haralambus paid off his debts by selling various quantities of cocaine to a variety of individuals. And, in this regard, Durso persisted in using threats and beatings to make sure that those commitments were indeed honored.

Turning to an analyzes of the evidence, the proof at trial requires a finding that a series of six small conspiracies were joined for the purpose of indicting the defendants on count 9. At the outset of the trial, Haralambus testified to a transaction involving two men named Junior and Allen. Their meetings led to Haralambus' receipt of "either cocaine or heroin" which he turned over to agents of the Drug Enforcement Administration (45-47). Clearly, at this point, Haralambus was serving in his capacity as an informant for the government and in essence was testifying concerning a conspiracy to which he could not have belonged. As a result of these preliminary meetings, however, Haralambus decided to deal on his own, without the knowledge of the Drug Enforcement Administration, and, at the behest of Fabella, met with Durso and formed what can be characterized as the second of the multiple conspiracies (46-63). It was this arrangement which led Haralambus to contact his cousin Mikedes who in turned arranged for Chris Williams to finance the purchase of four (4)

ounces of cocaine and for Bonita, and the appellant Morton to actually make the buy and transport the cocaine back to Washington, D.C.

The third conspiracy proved at trial involved a totally independent venture wherein the appellant Morton acquired some pharmaceutical cocaine in Philadelphia and sold it to two buyers in New York. While it is true that the evidence suggests that the sums derived from this sale were used in part to acquire the second quarter pound supplied by Durso, nevertheless, this particular act in no way involved the other members of the so called "chain" conspiracy pleaded in count 9. It was a single, hit-or-miss operation and certainly was not part of a regular business on a steady basis.

The fourth act forming the basis of an independent conspiracy involved the acquisition of a second quarter pound from Haralambus, Mikedes and Durso by Morton and Williams. This transaction was alleged to have taken place on or about March 14, 1974. In acquitting Morton of all involvement in this act, while finding the defendant Durso guilty, the jury apparently disbelieved the government's witnessess insofar as their testimony involved Morton. In any event, this operation was of a similar nature to the second of the multiple conspiracies described above. That is, it involved a simple buy of a quarter of a pound of poor quality cocaine. By the end of this transaction Morton was no longer involved in any of the acts described thereafter at trial, and, as pointed out above (see Point One, supra), Morton -- who had never even met either Durso or Fabella -- withdrew from his dealings with Mikedes and Haralambus and returned to his home in the Washington, D.C. area.

It is highly significant that the complex narcotics deals and financial arrangements testified to at trial virtually all occurred after Morton's involvement had clearly terminated. The fifth conspiracy proved at trial is illustrative in this regard. In order to work off various debts owed to Durso, Haralambus agreed to a totally new arrangement wherein he would "front" cocaine for Durso. For the first time then, Haralambus and Durso became actual partners in their future ventures instead of merely buyer and seller. In order to acquire lines of distribution in Washington, D.C., Haralambus entered into what might be characterized as the sixth conspiracy, which consisted of his partnership with Williams. If any "chain" conspiracy was established at all by the government at trial, it related to these events which as indicated, took place well after Morton was out of the picture. The highly prejudicial testimony relating to the incidents, deals, narcotics sales and financial arrangements generated by the fifth and sixth conspiracies must be viewed as having substantially prejudiced the jury below on the question of Morton's guilt of the crime of conspiracy, particularly when viewed in light of the fact that the Court below refused to charge on the "single act" doctrine and had, as noted above (Point One, supra), informed the jury that they could consider all of this damaging material against the appellant if they found that he was still a member of the conspiracy.

Since it is clear that a variance exists between the indictment and the evidence, multiple conspiracies having been proven, the inquiry proceeds to one of whether the variance is

material -- that is, whether it affects, the substantial rights of the accused. [Berger v. United States, 295 U.S. 78, 82 (1935); United States v. Agueci, 310 F.2d 817, (2d Cir. 1962); United States v. Miley, supra].

In United States v. Berger, 73 F.2d 278, 280 (2d Cir.1934) rev'd on other gds., 295 U.S. 78 (1935), this Court discussed what would affect substantial rights sufficiently to make the variance material and require reversal. Specifically, this Court wrote that the variance would be material where surprise hampers the presentation of the defense or where, as in the present case, "it will allow the production of evidence not competent or material to the crime he [the defendant] had committed."

Here, there was a staggering amount of evidence relating to the actions of others, which could not properly be attributed to Morton. The various drug sales prior to and following his short involvement with Haralambus, were all explicitly placed before the jury.

In United States v. Miley, supra, this Court cited Berger v. United States, 295 U.S. 78, 82 (1935), for the proposition that where multiple conspiracies were proved the true inquiry becomes were substantial rights of the accused affected [See also United States v. Bertolotti, supra, at 6420-6425].

This, of course, is correct, but this general language does not mean that there must be a specific showing of testimonial or evidentiary prejudice. All that Berger stands for is that where the appellants are members of the "core" conspiracy which was proved at trial, the variance is not fatal; despite the intro-

duction of evidence of other disconnected conspiracies [United States v. Baxter, 492 F.2d 150, 160 (9th Cir. 1973) cert. den. 94 S.Ct. 1945].

Here, there was no evidence to show that Morton was a member of the "core" conspiracy. Mainly because he was not. Under the circumstances, the variance was prejudicial and the conviction should be reversed.

In the instant case, the jury was charged that if more than one conspiracy was proved the defendants were to be acquitted. Thus, the jury's verdict reflects a finding of a single conspiracy. Under this finding and the charge given, the jury was permitted to view all the evidence -- with the exception of testimony relating to still yet a seventh conspiracy; the conspiracy between Durso and Fabella to use extortionate means to collect from Haralambus -- as being evidence against each defendant.

In light of the verdict, it is fair to say that the ample proof of the other conspiracies were, therefore, attributable to Morton and he was convicted. It seems dangerous to speculate as to the basis of a jury verdict under any circumstances. Here, where the verdict is a general one and the charge is conspiracy, involving several co-defendants, such a practice should be employed only with extreme caution [cf. United States v. Rosner,--F.2d--No. 74-2290 (2d Cir., dec'd April 29, 1975, slip op. 3245 at 3257)].

An alternative ground for a finding of prejudice is the spill-over effect[1] which may be found in joint trials [United States

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[1]There is of course some overlapping in the two asserted grounds of prejudice.

v. Bertolotti, supra, at 6420-1]. Here, the trial lasted some two weeks. In terms of the activities testified to, those involving Morton were minimal and took only a small portion of the trial. The crimes alleged to have been committed by the defendants ranged from the assault and extortion to the sale of drugs. All very different in character.

The trial here involved three defendants in six -- and if you include the extortion, seven -- different conspiracies and was a case where "[t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconscious or otherwise, are so great that no one can really say prejudice to a substantial right has not taken place." [Kotteakos v. United States, 328 U.S. 750, 774 (1946)].

Under the circumstances reversal is mandated and a new trial is required.

Before concluding, however, we deem it appropriate to address some additional observations to a closely related matter. Prior to trial the appellant Morton was permitted to join in the misjoinder applications submitted by his co-defendants and addressed to the fact that the instant indictment improperly joined the various extortion and extortion conspiracy counts with the narcotics charges contained in Counts 7 through 9. Additionally, the trial judge denied the appellant's pretrial application for severance -- which was appropriately renewed throughout the course and at the conclusion of the trial -- despite the fact that a similar application had been granted on behalf of the defendant Christopher

Williams, with the government conceding in its memorandum of law that at trial Williams would be substantially prejudiced by the spill-over effect of the evidence relating to the use of extortionate means by Durso and Fabella. The government acknowledged the obvious difficulty that Williams had not been indicted in connection with Counts 1 through 6 charging extortion and therefore, elected to proceed to trial by severing his case from that of Durso and Fabella [Minutes of oral motion, July 8, 1975, pp.16-24]. It is significant, that at the time of these proceedings, Morton had not yet been arrested nor had a firm trial date been established. Subsequently, the appellant was arrested and, after waiving removal the State of Maryland, appeared before the trial Court unassisted by counsel. A notice of appearance was not filed on his behalf until approximately one week prior to trial and all requests by defense counsel for a continuance and severance were repudiated out of hand [Minutes of oral motion, July 8, 1975, pp. 2-38].

The Court's denial of appellant's application pursuant to Rule 8(b), Federal Rules of Criminal Procedures, and his related requests for severance, when viewed in light of the prejudice to the appellant created by the joinder herein, as already discussed in detail above, warrants reversal as a matter of law [cf.United States v. Miley, supra at 1209-1210].

As aptly observed by Judge Friendly in Miley, wherein, it must be recalled, all of the appellants had been charged in the very same conspiracy counts:

> "Absent the conspiracy count, we doubt that the joinder requirements of Fed. R. Crim. P.8(b) could be met,since not all the appellants were otherwise 'alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses' (Emphasis supplied)". [supra at 1209; see also the cases and authorities cited therein].

The Court in Miley went on to note that the joinder therein was proper because the conspiracy count charged each and every appellant with the same criminal act; a circumstance notably different than in the case at bar. As discussed previously, Morton and his original co-defendant Williams, were not alleged to have participated in the extortionate activities used to collect the debts incurred to Durso by Haralambus. And even the government recognized in its memorandum to the Court consenting to Williams' severance, the highly prejudicial aspect of trying the extortion and narcotics allegations together.

In concluding that the convictions should be affirmed, the Miley Court issued the following admonition:

> "Accordingly, since we have been unable to discern any prejudice from the joinder, we are unwilling to reverse because of denial of the motions for severance, as we surely would under the circumstances of this case if any prejudice had been shown. We trust that heed by prosecutors in this circuit to our observations in United States v. Sperling, supra, 506 F.2d at 1340-41, will prevent such vexing problems from arising in the future." [supra at 1210].

The strong admonition contained in Miley, which was decided some four months prior to the commencement of Morton's trial, must be adhereed to, with the result that appellant's conviction should be reversed.

POINT THREE

THE JUDGMENT OF CONVICTION MUST BE REVERSED AND THE INDICTMENT DISMISSED BECAUSE THE DEFENDANT WAS TRIED UNDER THE PURPORTED AUTHORITY OF AN INDICTMENT WHICH WAS FATALLY DEFECTIVE IN THAT IT UNLAWFULLY CHARACTERIZED DEFENDANT AS "JOHN DOE, ALSO KNOWN AS BEBE," THUS LACKING THE DEGREE OF SPECIFICITY REQUIRED BY THE FIFTH AMENDMENT. ALSO, IN THAT CONNECTION, THE COURT UNLAWFULLY PERMITTED AN AMENDMENT OF THE INDICTMENT SO AS TO INSERT THE DEFENDANT'S NAME, AN ACT WHICH IMPROPERLY TRANSFORMED THE INDICTMENT INTO THE INDICTMENT OF THE COURT RATHER THAN THAT OF THE GRAND JURY.

It is settled that an indictment must be specific enough in order to comply with the Fifth Amendment's mandate that a defendant must be tried on an indictment of a grand jury and that an indictment must not become, by interpolation, the indictment of either the Court or the prosecutor [Gaither v. United States, 413 F.2d 1061, 1071-1072 (CADC 1969) and cases cited therein].

In order to implement this constitutionally mandated policy against the transformation of defective indictments into indictments of either the Court or prosecutor, a rule has evolved strictly prohibiting the amendment of an indictment on matters of substance under penalty that any violation of these strictures requires the dismissal of the indictment [Stirone v. United States, 361 U.S. 212, (1960); Connor v. Picard, 434 F.2d 673 (1st Cir., 1970), vacated on other grounds, 404 U.S. 270 (1971)].

In the case at bar, one of the parties indicted by the Grand Jury was identified by them as "John Doe, also known as Bebe.'" The defendant William Morton was arrested pursuant to the purported authority of said indictment on the strength of the prose-

cutor's conclusion that he in fact was the individual referred to in the indictment as "John Doe, also known as'Bebe'".

Prior to trial defendant moved to dismiss the indictment on the grounds that the Grand Jury did not indict William Morton and the attempt on the part of the government to prosecute Morton pursuant to the indictment would violate the Fifth Amendment requirement of specificity designed to insure that the indictment is in fact the indictment of the Grand Jury. Prior to that motion, the government moved to amend the indictment in order to substitute "William Morton, also known as'Bebe'"in place and instead of "John Doe, also known as'Bebe'"(Minutes of oral motion, dated July 8, 1975, 39-48).

The position of the defendant William Morton was that in light of the designation in the caption of the indictment as one of the defendants as "John Doe, also known as'Bebe'"that the Grand Jury failed to indict the defendant William Morton for the crimes attributable in the indictment to the individual referred to as John Doe. In this connection, it is significant to note that the Grand Jury minutes reveal that testimony adduced before the Grand Jury in fact referred to the individual characterized as "John Doe as "Bebe Morton" (Decision and order,July 10, 1975, p. 2).

Despite that salient fact, the Grand Jury chose not to refer to the individual known to them as "John Doe, also known as'Bebe'" by the additional use of the last name Morton which was before them through evidence produced during the presentation of the matter.

In Connor v. Picard, supra, the First Circuit Court of Appeals held in no uncertain terms that it was unconstitutional

to try a defendant under a so-called John Doe indictment [Connor v. Picard, supra at 675]. Moreover, the Connor v. Picard Court held that the lower Court's approval of a prosecutorial request to amend the indictment in that case so as to add the name of the defendant was clearly improper since there was nothing to demonstrate that the person referred to in the indictment as having committed certain criminal acts was in fact the individual that the prosecution and Court had chosen to identify as the defendant in that case. The relevant principles enunciated by the Connor v. Picard Court on the subject of amendment of a John Doe indictment are on all fours with the facts on this case on that subject. There is no indication whatsoever that the Grand Jury herein had before them testimony which sufficiently described William Morton as the individual named in the indictment as "John Doe, also known as 'Bebe'". In light of that, the actions of the Court in approving the prosecutor's motion to amend the indictment to add the name William Morton has resulted in a situation whereby William Morton was brought to trial on serious felony charges not by any indictment handed down by a Grand Jury but instead by an indictment created by the Court at the behest of the prosecutor, in clear violation of the Fifth Amendment.

During the oral argument of the point below, it was brought out that there was sufficient time for the prosecutor to return to the Grand Jury in order to permit them, in accordance with the relevant constitutional protections, to determine whether there was in fact sufficient evidence to justify naming William Morton

as the individual referred to by the Grand Jury as "John Doe, also known as 'Bebe'" (Minutes of oral motion, July 8, 1975, at 44-45). The prosecutor chose not do so and the Court determined that an amendment was permissible pursuant to Rule 7(E) of the Federal Rules of Criminal Procedure because, in the Court's view, the requested amendment was one of form and not of substance (Decision and Order, July 10, 1975 p. 2). The cases referred to by the Court in an endeavor to justify that conclusion, however, are inapposite since it is not clear that the Grand Jury concluded that the defendant Morton is in fact the party named as John Doe in the indictment. Indeed, it is our position that the Court below misplaced reliance upon the fact that at some point during the testimony before the Grand Jury the person referred to as John Doe was referred to as "Bebe Morton". That fact, however, considered in light of the Grand Jury's refusal to describe John Doe as Morton in the indictment itself must be construed as an indication that the Grand Jury had concluded that the person referred to by the name of as "John Doe, also known as'Bebe'"was not the person referred to by the name of Morton. In order to insure that in fact the Grand Jury had Morton in mind when it chose to indict John Doe, also known as'Bebe'"it was incumbent upon the Court to refuse to grant the motion to amend the indictment so as to compel the prosecutor to return to the Grand Jury to enable the members of that body to make the determination they are charged by the Constitution with making, namely, a determination as to what individual should be tried for the crimes attributed in this indictment to the individual known as "John Doe, also known as'Bebe'". This was not done, with the consequence that this Court is presently obliged to reverse the judgment of conviction and dismiss the indictment

which did not charge the defendant William Morton with the commission of any crime.

POINT FOUR

BY ADOPTING A MECHANICAL POLICY OF DELIBERATELY REFUSING TO CONSIDER THE POSSIBILITY OF IMPOSING A SENTENCE OF PROBATION IN NARCOTICS CASES, THE TRIAL COURT IMPROPERLY FAILED TO EXERCISE DISCRETION IN SELECTING AN APPROPRIATE SENTENCE.

Prior to considering the propriety of the instant sentence, we deem it appropriate to point out our view that this Court possesses the power to review the sentence imposed upon the defendant herein. We are not unmindful of the fact that, generally speaking, the severity or duration of punishment imposed by a trial Court is not subject to modifications where the sentence imposed is within the requisite legislative limits; nevertheless, it is clear that the process of sentencing an offender is not wholly immunized from judicial review merely because the sentence falls sonewhere within certain statuttory limits [Williams v. Oklahoma, 358 U.S. 576 (1959); Williams v. New York, 337 U.S. 241 (1949); Townsend v. Burke, 334 U.S. 736 (1948); Yates v. United States, 356 U.S. 363, 366-7 (1958); Woosley v. United States, 478 F.2d 139 (8th Cir., 1973); United States v. Daniels, 446 F.2d 967 (6th Cir., 1971); United States v. Wilson 450 F.2d 495 (4th Cir., 1971); United States v. Williams, 407 F.2d 940 (4th Cir.,1969) and the cases and commentators cited therein].

Various Circuit Courts of Appeals have remanded for resentencing in cases where it appeared that the sentencing judge had improperly considered certain factors in sentencing; improperly relied upon certain false information or mis-information; relied upon assumptions unsubstantiated in the record; grossly abused his

discretion by failing to evaluate the relevant information before him with due regard for the factors appropriate to sentencing; or failed to exercise his discretion in imposing sentence [See Woosley v. United States, supra; United States v. Daniels, supra, and case cited therein].

Plainly then, the precedents establish that significant inforads have been charted in what once was thought to be the sacrosanct provice of the trial judge [See 32 F.R.D. 264, 265-8 (Sobeloff, Chief Judge)]. If it appears therefore, that in discharging its "duty to impos[e] a proper sentence", the District Court has either abused or failed to exercise its discretion, or has otherwise impaired defendant's sentencing safeguards, this Court may act to rectify the error [United States v. Daniels, supra, at 970-1; Scott v. United States, 419 F.2d 264, 266-7 (D.C. Cir., 1969); United States v. Malcolm, 432 F.2d 809, 816-18 (2d Cir.,1970); United States v. Brown, 470 F.2d 285, 288 (2d Cir., 1972); United States v. Wilson, supra; United States v. Williams, supra].

We turn now to a consideration of the sentencing procedures employed below.

On September 19, 1975 the appellant appeared before Chief Judge Mishler for sentence. Before sentencing Morton to concurrent two-year prison terms and five-year terms of special parole, the Court allowed both the defendant and his attorney an opportunity to be heard.

The primary thrust of counsel's remarks on behalf of Morton was to demonstrate the appropriateness of a sentence of probation. In that regard, counsel's statement pointed out the facts that at

the time of judgment, Morton was thirty-one years old, married and the father of an eight year-old son. Both the probation report, which counsel was permitted to view and counsel's remarks further demonstrated that the defendant had been gainfully employed throughout his adult life and had dutifully attended to the needs and support of his wife and child. It was further established that Morton was then attending Bowie State University as a part-time student. The Court was also apprised of the fact that the appellant had been honorably discharged from the United States Navy after having served with distinction for two years in Vietnam. References were made to a variety of testimonial letters sent to the Court by friends and relatives alike, with particular reference being made to letters from the appellant's wife, mother and a Roman Catholic nun who knew the family through her close contact with the defendant's young son. Emphasis was also placed on the relationship between the appellant and his child and the fact that there was heavy interdependence on the part of the child toward the father.

In an endeavor to explain Morton's unlikely involvement in the case at bar, counsel did not try to minimize the seriousness of the offenses for which the defendant had been found guilty, but, rather, had attempted to demonstrate that his prior usage of cocaine -- which had since terminated -- was at the core of his involvement in the instant case. The Court was also informed that there was no profit derived by Morton from the transaction for which he was found guilty, but rather, he had entered into the purchase hoping to acquire some cocaine for his own use. During sentencing counsel was allowed to correct several erroneous statements contained within the probation report and was assured by the Court

that it would disregard any and all such statements (minutes of sentence, September 19, 1975.26-32). Counsel concluded his remarks with a specific request for probation (id. at 32). It was at that juncture that the Court made the following highly pertinent remarks:

> "THE COURT: No.
>
> "I think a great deal of what you say I agree with, I think there is something very attractive about the defendant. He has a very stable and supportive family.
>
> "I have read all the record, but this is a serious offense. He did deal in cocaine and the jury found that he dealt with cocaine, and I don't think that anyone that makes a business of dealing in cocaine for however brief a time is entitled to probation" (id. at 32).

The Court then proceeded to impose sentence and, thereafter, made note of the fact that the other members of the Court's sentencing panel would have given more severe sentences but that the sentencing judge who had of course heard the evidence at trial was more familiar with Morton's involvement. The Court then went on to say:

> "THE COURT: Yes, they recognized that this defendant played a lesser role than the other two, and of course he was free of any suggestion of violence. There is no suggestion of violence in his background.
>
> "I think, as I say, he presents a very stable background and I think he has a wife who fully understands him. He is very fortunate to have that" (id. at 33).

In Williams v. New York, supra, the Supreme Court praised the modern penological philosphy of "individualizing sentences", and discussed the dual responsibility of a sentencing judge with regard to a convicted criminal offender: First, to possess the fullest possible information about an offender; and second, to mete

out a sentence based upon those factors appropriate to the "important goals of criminal jurisprudence". In this regard, the Court observed:

> "A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.
>
> "Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. People v. Johnson, 252 N.Y. 387, 392 N.E. 619, 621. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." 337 U.S. at 247, 69 S.Ct. at 1083.

The record in the case at bar, clearly demonstrates that the sentencing judge, rather than fashioning an "individualized sentence" tailored to fit this particular offender, instead adopted an inflexible, mechanical approach to sentencing Morton, thus mandating a remand to the District Court for resentencing [Woosley v. United States, supra, at 143-46; United States v. Daniels, supra, at 471; United States v. McCoy, 429 F.2d 739, 743 (D.C. Cir.,1970)].

In so doing, the Court concomitantly committed clear error by refusing to give consideration to Morton's claim for probation.

In McCoy, supra, the Court critically reviewed the propriety of a sentence meted out by a District Judge who had stated that it was his policy to impose a sentence of life imprisonment on any defendant convicted of armed robbery. In condemning the sentence imposed in accordance with that policy, the Court of Appeals

noted:

> "...the judge's stated policy completely undermines the basis on which trial judges have been accorded wide latitude in excercising discretion in determining sentences. In theory, the trial judge is in a peculiarly good position to determine the appropriate sentence because he will have heard the evidence at trial, observed the demeanor of the defendant, absorbed the information in the presentence report, and heard any further personal information or assurances offered by the defendant's allocution. But a rigid policy based solely on the crime with which the defendant is charged is not an exercise of discretion." [United States v. McCoy, supra, at 743] (Emphasis added).

Similarly, in Woosley, supra, the Court had occasion to comment about the actions of a trial judge who sentenced eight different defendants who had refused to comply with the Selective Service Law to maximum prison terms of five years. In vacating defendant's sentence, the Eighth Circuit held that such a "mechanical approach" to sentencing plainly conflicts with sentencing guidelines announced by the Supreme Court in Williams v. New York, supra, requiring that a sentence be tailored to fit the offender and, as such, constituted a failure on the part of the Court to properly exercise its discretion, that is to say, the type of discretion which implies conscientious judgment and not the type of automatic action taken by the sentencing judge herein [Woosley v. United States, supra, at 143-145, 145-146].

In the final analysis, the cases cited attach significance to the question of whether the Trial Court had adopted a rigid policy based solely on the nature of the crime with which the appellant had been charged. If the Court has so sentenced, it has wrongfully failed to exercise the type of informed judicial dis-

cretion to which every defendant is entitled [Woosley v. United States, supra, at 144-5, 145-6].

It seems quite clear from the Court's remarks that its sole consideration in fixing sentence herein was defendant's participation in what the Court viewed as a serious criminal offense. The Court plainly viewed that factor as the primary factor to be taken into consideration in sentencing the appellant Morton. At no point, did the Court attempt to justify a prison sentence based on Morton's "past life and habits" [Williams v. New York, supra at 247]. In our view the Court virtually disregarded the salient sentencing factors referred to above. If they were considered at all, the Court did so only for the purpose of evaluating the number of years of confinement, and not for the purpose of determining whether confinement was indeed necessary.

Stated another way, while the Court acknowledged the fact that Morton's background and home life were stable and supportive and suggested that defendant was indeed otherwise qualified for probation, it resorted to a mechanical sentencing conclusion mandating a term of imprisonment solely because of his concededly brief dealings in cocaine.

As a result of the foregoing, the District Judge gave absolutely no consideration to Morton's request for probation.

As the Supreme Court pointed out, in recognizing the power of federal appellate courts to review a refusal of probation:

> "The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action, ***It takes account of the law and the particular

> circumstances of the case and is 'directed by the reason and conscience of the judge to a just result.' ***While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice" [Burns v. United States, 287 U.S. 216, 221-223 (1932), cited in Woosley v. United States, supra at 146; see also Mann v. United States, 218 F.2d 936, 939 (4th Cir., 1955)].

In short, the Court's refusal to consider probation as a reasonable alternative in fashioning Morton's sentence was in and of itself error of reversible dimension requiring resentence before a different judge [Mawson v. United States, 463 F.2d 29 (1st Cir., 1972); United States v. Rosrer, 485 F.2d 1213, 1231 (2d Cir., 1973); United States v. Looney, 501 F.2d 1039, 1042 (4th Cir., 1974)].

POINT FIVE

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT ADOPTS ALL RELEVANT POINTS CONTAINED IN CO-APPELLANTS' BRIEFS.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AMD THE INDICTMENT DISMISSED OR IN THE ALTERNATIVE A NEW TRIAL GRANTED.

Respectfully submitted,

JEFFREY WEINGARD
Attorney for Appellant

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USA v. MORTON 1735

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of December 1975 deponent served the within brief upon:

RICHARD S. STOLKER, Attorney,

(JOSEPH A. MONICA AND H. ELLIOT WALES)

attorney(s) for appellee

in this action, at

Criminal Division, Dept. of Justice,
Washington, D.C. 20530 Room 2315

(Monica---295 Madison Ave., NYC 10017
Wales----747 Third Ave., NYC 10017)

the address(es) designated by said attorney(s) for that purpose by depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 12
day of December, 1975.

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976